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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1369

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EVERETT M. BRATCHER, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

MILTON KRAMER,
JOSEPH A. FANELLI,
Counsel for Petitioner.

SCHOENE, FREEHILL, KRAMER & FANELLI,
Of Counsel.

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Comes now the petitioner, Everett M. Bratcher, by his attorneys, and prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this cause on May 9, 1945, which affirmed a judgment of conviction against the petitioner under Section 11 of the Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 894).

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 329) has not yet been reported. The opinion of the District Court (R. 321) overruling petitioner's motion to suppress certain evidence has not been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on May 9, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. The petitioner resided in the District of Columbia, where he also made his livelihood, registered under the Selective Training and Service Act, was ordered to report for induction to the District of Columbia Selective Service Headquarters, and reported for induction. He is charged with evading induction by presenting himself in an abnormal physical condition resulting from his having taken benzedrine for the purpose of causing an abnormal physical condition to evade induction. His physical examination took place at the Ft. Myer induction station (to which he was transported), which the Government contends was in Virginia. The initial question is whether, assuming the induction station was in Virginia, he could properly be tried in the District Court for the Eastern District of Virginia,[1] although all the significant facts were localized in the District of Columbia.

2. Whether the prosecuting attorney's accusation against petitioner's trial counsel, in the prosecutor's argument to the jury, that trial counsel had (in his argument) cast reflection on the jury's integrity, and the trial judge's ruling upon objection that such question was one for the jury to determine, prevented a fair trial and constituted reversible error.[2]

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[1] If this petition for a writ of certiorari is granted, petitioner will urge also that the record fails to show that the Ft. Myer induction station was in Virginia.

[2] If this petition is granted, petitioner will urge also that a fair trial was prevented and reversible error committed by the prosecutor's injection of the issue of patriotism and his prejudicial comment on irrelevant evidence in his argument to the jury. (R. 281)

3. Whether petitioner has shown that his order to report for induction, and his hospitalization by the induction station officials to obtain a 24-hour specimen of his urine at the time he had his examination, were made for the purpose of obtaining evidence to be used against him in this cause, which evidence was so used, thereby infringing petitioner's rights under the Fourth and Fifth Amendments to the Constitution. Petitioner moved in the trial court that the evidence so obtained be suppressed, but the motion was overruled.[3]

4. Whether the action of the jury foreman in bringing into the jury room, during the jury's deliberations, a newspaper containing a prejudicial discussion of the case, prevented a fair trial and verdict and constituted reversible error in the absence of any showing that no prejudice resulted.[4]

Statute Involved.

The statute involved, Section 11 of the Selective Training and Service Act of 1940, approved September 16, 1940, c. 720, 54 Stat. 894, is printed in the Appendix to this Petition, p. 16.

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[3] If this petition for a writ of certiorari is granted, petitioner will urge also that the trial court erred in refusing to permit petitioner to show to the jury the real purpose of his order to report for induction and the real purpose of his hospitalization.

[4] If this petition is granted, petitioner will urge also that: (1) There was no substantial evidence to prove four of the elements of the crime charged: (a) that he evaded service, (b) that his blood pressure was abnormal for him, (c) if his blood pressure were abnormal, that it was due to his use of benzedrine, and (d) his intent in using benzedrine. (2) the admissions in evidence of Government Exhibits 3, 4, and 6, and permitting them to go to the jury room without request therefor by the jury, individually constituted reversible error. (3) There was reversible error in the trial judge's omission from his charge to the jury that to find petitioner guilty they must find that his consumption of benzedrine was the cause of his not being inducted. (4) It was error for the trial court to refuse to strike the testimony of the witness Chambers. (5) It was error for the trial judge to omit from his charge to the jury a statement that to find petitioner guilty they must find his consumption of benzedrine was the cause of his not being inducted.

Statement.

General:

Pursuant to regulations under the Selective Training and Service Act, petitioner registered for the draft on October 16, 1940, in Washington, D. C., where he was born and for many years has continuously resided and worked.[5] (R. 78, 241) On December 2, 1941 he was classified I-B (for limited military service) on account of defective eyesight. On February 6, 1943 he was ordered to report on February 18, 1943 for induction, but that order was rescinded by his draft board. On March 16, 1943 he was classified III-A because of his ailing mother's dependency upon him for her support. On August 16, 1943 he was ordered to report for induction on August 28th, but was rejected and on September 15, 1943 was placed in IV-F (physically unfit for military service). Two months later, on November 12, 1943, he was again ordered to report for induction on November 23rd, and was again rejected. (R. 15, 79-80)

In 1936 or 1937 petitioner began using benzedrine to keep him awake at late hours and to make him feel livelier (R. 249), and during the three years preceding the trial was a frequent and heavy user of that stimulant. (R. 218, 221-22, 237, 243-4, 257-258) He normally went to bed between four and six o'clock in the morning, and frequently was awake all night. He was awake throughout the night preceding his examination in November, 1943, and as was his custom in such situation, he consumed some benzedrine. (R. 244, 246)

Benzedrine is a non-habit forming stimulant (R. 142) which stimulates mentally and physically, making the user feel wide awake and alert. Its use is not uncommon among students "boning" for examinations (R. 146), and by night truck drivers (R. 239, 240), and is also commonly used

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[5] The petitioner was the organizer, manager, and conductor of a popular dance orchestra in Washington, D. C. which performed in the Hotel Washington. His orchestra played at numerous functions without compensation, including U. S. O. dances, Bolling Field, and other army functions. (R. 238-240, 242)

by aviators, whose use of it has been advocated by an Army Air Force General. (R. 146-47, 238) It is very commonly used by dance orchestra musicians and particularly by band leaders to assist them through their unusual schedule and the nervous strain under which band leaders operate. (R. 215, 221-222, 223, 225-226, 239)

Prior to petitioner's order to report for induction in November 1943, the Federal Bureau of Investigation had received a report, from an undisclosed source, that petitioner's rejection in August had been due to his use of benzedrine. The circumstances leading up to his induction order and examination in November are stated below. On January 27, 1944, the petitioner was visited by two agents of the Federal Bureau of Investigation who called upon him for the purpose of obtaining a written statement. (R. 195) They did obtain a statement signed by petitioner, in which he freely admitted, as he had orally, that he used benzedrine frequently and had used it the night before his examination as a stimulant to keep him awake, as was his practice, through the extended hours he was keeping. (R. 190, 243)

At his examination in November, as had been the case in August, petitioner was found physically unfit for service and was continued in classification IV-F, principally on account of high blood pressure, although his eyesight was also defective. (R. 15, 80) (His eyesight was at the very limit that would have been accepted for any service, and would have kept him in limited service had he been accepted. (R. 15) But pursuant to arrangements previously made with the Federal Bureau of Investigation, he was hospitalized to obtain a 24-hour specimen of his urine, by which benzedrine is detected. The Government introduced evidence tending to show, if admissible, a very small amount of benzedrine to have been contained in the 24-hour specimen. There was no evidence of petitioner having been examined and found qualified for even limited service at any time except in 1941.

The trial judge instructed an acquittal on the first count of the indictment, charging petitioner with evading service

in August, 1943. (R. 276) Upon the basis of the evidence obtained by means of petitioner's examination in November, the jury returned a verdict of guilty on the second count charging evasion of service in November. They returned a verdict of not guilty on the third count charging petitioner with falsely answering questions of the medical examiners by not disclosing, in response to certain questions, that he had consumed benzedrine the previous night. (R. 293) The trial judge imposed a sentence of imprisonment for four years (the maximum provided in the statute is five years) and a fine of $1,000. (R. 310) The Circuit Court of Appeals affirmed the judgment.

Pertaining to the Motion to Suppress Evidence:

In August, 1943, a registrant named Joyner collapsed at Ft. Myer while being examined, as the result of an overdose of benzedrine.[6] The Federal Bureau of Investigation was notified and given a list of registrants theretofore found to have high blood pressure. They decided that the presence of benzedrine in the human body could be detected by an analysis of the urine. (R. 41-44)

Agents of the F. B. I. upon their own initiative (R. 56) called upon the chief medical officer of the Ft. Myer induction station, Major Malcolm D. Harrison, and discussed the effect of benzedrine on blood pressure (R. 91, 92) and the possibility that certain registrants had used benzedrine. (R. 10) They also advised the District of Columbia Selective Service Headquarters that they suspected petitioner of having violated the Act. (R. 55, 56)

On November 12, 1943, less than two months after petitioner had been classified as physically unfit for military service, his local draft board in Washington, not upon its own initiative but upon instruction from the District headquarters, ordered petitioner to report on November 23, not for examination but for induction. (R. 4-5)

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[6] He, and heretofore all others from the District of Columbia similarly situated, were immediately inducted. (R. 11, 12)

Agents of the F. B. I. called upon Major Harrison again about November 1, 1943, and once more the night before November 23. (R. 15, 31-34) They told him that benzedrine might cause high blood pressure, and that it could be detected in the urine but that to do so it was desirable to obtain a 24-hour specimen. (R. 44, 50) It was from the F. B. I. agents, not from petitioner's local board or the District Selective Service Headquarters, that Major Harrison learned that petitioner and certain others were coming to the induction center on November 23. (R. 13, 16, 20, 44-45) They discussed petitioner in particular, and the agents told Major Harrison they suspected petitioner of using benzedrine. (R. 13, 45, 49, 50, 53, 90) They discussed petitioner's "expected delivery" to the induction center (R. 30), and the agents suggested that Major Harrison obtain a sample of petitioner's urine. (R. 53-55) They agreed that when petitioner was delivered for examination on November 23 he would be hospitalized for 24 hours and a 24-hour specimen would be obtained and turned over to the F. B. I. to determine whether it contained benzedrine (R. 12, 16, 21, 25, 37, 44), and Major Harrison agreed to give the F. B. I. any other evidence that might be disclosed by the examination. (R. 32) Major Harrison knew that all the activities of the F. B. I. in connection with petitioner's examination, the urinalysis, etc., were conducted for the purpose of presenting the results to the United States Attorney; but of course they made no arrangements for petitioner to be apprised that his examination was anything but routine. (R. 55, 56-57, 58-59)

Normally the examination at the induction center consisted of a series of independent examinations. (R. 14) Petitioner was not given this usual series, but was examined only for his blood pressure and then sent to Major Harrison's office (R. 14-15, 28-29), although his eyesight at his previous examination was at the very limit of acceptability for even limited service. His blood pressure was found to be high, and the doctor who took it had another

doctor verify his reading. That had not been done upon the previous examination. (R. 98)

Although Major Harrison knew that petitioner thought he was being examined for induction (R. 33), he did not advise him of the true purpose of the examination nor of the subsequent hospitalization nor that he had been the subject of discussion with the F. B. I. (R. 33) He ordered petitioner hospitalized for a 24-hour period, with periodic readings of his blood pressure and a 24-hour specimen of his urine to be taken; but before he could possibly have known whether petitioner's blood pressure would be normal after the hospitalization, and although it was the practice at the station to induct immediately those found physically qualified, he ordered petitioner discharged at the end of the 24-hour period and to be furnished transportation back to Washington. (R. 14, 25-26, 103)

Before petitioner appeared at the hospital, and therefore before it could have been known that his blood pressure would be high when he did report, the nurses at the hospital knew that petitioner was going to be sent there from the induction center (R. 60-61), that a 24-hour urine specimen was to be obtained (R. 61, 114-15) to determine whether he had taken benzedrine (R. 34, 37, 38-39, 64-65), and that the F. B. I. was collecting the specimen and would analyze it. (R. 39, 65) At least one of them inferred there would be a criminal prosecution if benzedrine were found, but of course did not advise petitioner of the purpose of his being hospitalized nor that his urine was to be given not to the army authorities but to the F. B. I. (R. 40-41, 65-66)

The F. B. I. made meticulous arrangements to be able to prove the continuity of petitioner's 24-hour specimen. Prior to his reporting for examination on November 23 they advised the nurses of the purposes of petitioner's prospective visit to the hospital and instructed them on the manner in which the specimen was to be collected to prove its identity; they furnished the nurses with the jar in which petitioner was to void the 24-hour specimen and instructed

them on its return to the F. B. I. (R. 36-37, 40, 46, 58, 60, 125) One of the nurses gave petitioner the jar (R. 36), but did not advise him it was his privilege to refuse to give his urine in it (R. 67) nor the purpose of collecting his specimen, but on the contrary told him it was a routine collection of specimen. (R. 34) She had been instructed to ask petitioner to sign his name on the slip accompanying the jar and then to add her initials. (R. 34, 36, 40) The nurse who removed the jar from the room petitioner had occupied also initialed the slip (R. 64), and placed the jar in the nurses' chart office on a table. (R. 112, 118) A third nurse found the jar on the floor in that office (R. 118), and gave it to the F. B. I. agents. (R. 34, 118) If this were a routine examination and the F. B. I. were performing the special urinalysis as an accommodation for the army, an ordinary messenger might have been expected to deliver the jar from the hospital to the F. B. I. laboratory; but instead F. B. I. agents Clark and Brack personally called at the hospital for the express purpose of collecting the jar. (R. 53) Each of them initialed the date it was received, brought it to the F. B. I. laboratory, and a month later, after a portion of it had been analyzed, the same agents transported it to the Washington field office where it was kept in a safe. (R. 121-122, 125)

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred—

1. In holding that petitioner could properly be tried in Virginia for the crime charged.

2. In holding there was no prejudice in the prosecutor's remarks to the jury.

3. In holding that the evidence obtained as a result of petitioner's examination and hospitalization in November 1943 did not constitute an unreasonable search and seizure and that the use of such evidence at the trial did not constitute compulsory self-incrimination.

4. In holding that no prejudice or error was created by the action of the jury foreman in bringing into the jury room a newspaper containing a prejudicial discussion of the case.

5. In holding there was sufficient evidence to support the verdict.

6. In holding there was no error in the trial court's refusal to grant a new trial.

7. In not reversing the judgment for refusal of the trial judge to permit petitioner to show the jury the real purpose of his November 1943 examination and hospitalization.

8. In not reversing the judgment because of the trial court's error in admitting in evidence Government Exhibits 3, 4, and 6, and in permitting them to go to the jury room without a request therefor by the jury.

9. In not reversing the judgment because of the trial judge's omission from his charge to the jury that to find petitioner guilty they must find his consumption of benzedrine was the cause of his not being inducted.

10. In holding there was no error in the trial court's refusal to strike the testimony of witness Chambers.

Reasons for Granting the Writ.

I. On December 18, 1944, this Court decided *United States* v. *Johnson and Layton*, 323 U. S. 273, holding that public policy, in the light of Article 3, Section 2 of the Constitution, and the Sixth Amendment, requires a criminal trial to be held, if the statute can possibly be so construed, only in the State where the crime begins and where in most cases the accused would reside and be known.[7] In that case this Court found the absence of explicit and compelling language

[7] The statute involved in that case was the Federal Denture Act of 1942, 56 Stat. 1087, 18 U. S. C. sec 420 (f) (g) (h).

authorizing trial in more than one State a significant indication that Congress intended trials to be limited to the State where the criminal action began if a crime could be found to have been committed in that State.[8]

In this case also the act contains no language indicating that a trial for any particular violation might be had in more than one jurisdiction, but on the contrary a policy of localism is expressed in the act itself which is replete with references to local boards and local administration. The regulations under the Act, in harmony with that policy, contain innumerable such references.

The opinion of the Court below contains no discussion of this point but simply by assertion that the District Court in Virginia had jurisdiction (R. 334), although it was in the District of Columbia that the petitioner resided, made his livelihood, registered under the Selective Training and Service Act, was ordered to report for induction, and reported for induction. Obviously, the Court below failed to understand the purport and scope of this Court's decision in the *Johnson and Layton* case.

This point is of considerable importance, especially to District of Columbia residents who are charged with Selective Service crimes, because they are actually inducted in other jurisdictions, although ordered to report in the District of Columbia.[9] It appears (R. 295) that this is a test case for 17 others, whose trials are awaiting the final disposition of this case.

The policy underlying the decision in the *Johnson and Layton* case is of particular applicability here. The jury in Virginia consisted predominantly of farmers and other

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[8] See also *Ireland* v. *Henkle*, 179 Fed. 993; *United States* v. *Smith*, 173 Fed. 227; *United States* v. *Bickford*, Fed. Cas. No. 14,591; *United States* v. *Van Den Berg*, 139 F. (2d) 654; *Clemmings* v. *United States*, 10 F. (2d) 751.

[9] Originally prospective inductees in the District of Columbia were examined in District hospitals. (R. 6) In November 1943 they were examined and inducted at Ft. Myer. (R. 81) Counsel are advised that today they are sent to Baltimore.

rural inhabitants. The accused they were judging was a person peculiar to metropolitan areas,—a band leader, who generally went to bed about the time the jurymen awakened, and who conducted many of his business negotiations and enjoyed much of his social life after midnight. (R. 244, 258) Farmers, of course, are no less intelligent and make just as good jurors as residents of a metropolis, but petitioner was likely to be an enigma to them, a person whom they would be likely to regard as peculiar and unorthodox. Where the evidence was so weak, and involved so many issues, as in this case, had the trial been had in petitioner's home community, these intangible factors, sensed in the framing of the Sixth Amendment, and recognized in this Court's recent decision in the *Johnson and Layton case*, might well have tipped the scales in favor of his acquittal.

II. During the course of his closing argument to the jury the prosecutor accused petitioner's trial counsel of having cast reflection upon the jury's integrity. Trial counsel objected, but the Court ruled that that was a question for the jury to determine. (R. 287-8)

In *New York Central R. R.* v. *Johnson*, 279 U. S. 310, this court held that the raising in such manner of an issue of the good taste or misconduct of opposing counsel was error requiring reversal.[10] This Court said further that failure to sustain an objection to such an attack was enhancement of the prejudice, since it would leave the jury with the impression that such issue could properly be considered by them. Here we need rely upon no conjecture on the impression that might be left with the jury, for the trial court expressly ruled that this question was an issue for the jury to determine.

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[10] See also *Read* v. *United States*, 42 F. (2d) 636, 645; *Ippolito* v. *United States*, 108 F. (2d) 668; *Lau Lee* v. *United States*, 67 F. (2d) 156; *Turk* v. *United States*, 20 F. (2d) 129; *Hall* v. *United States*, 256 Fed. 748; *Paquin* v. *United States*, 251 Fed. 579; *Sparks* v. *United States*, 241 Fed. 777, 790; cf. *Middleton* v. *United States*, 49 F. (2d) 538.

The opinion of the Court below incorrectly describes the trial court's ruling and simply asserts that the cases cited by petitioner, including the *Johnson* case, are "easily distinguishable and not controlling". (R. 335) Not only is the decision of the Court below, that no prejudice resulted, squarely in contradiction of the decision of this Court in the *Johnson* case, but its holding sanctions such a course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III. It must be plain from the mere recital of the facts (*supra*, pp. 6-9) that petitioner's order to report for induction was issued, and his examination and hospitalization were undertaken, not with a view to inducting him but for the purpose of obtaining evidence to be used against him under the guise of an induction procedure.

But however the entire procedure may be regarded, at least the hospitalization of petitioner on November 23 to obtain a 24-hour specimen of his urine was an unreasonable search and seizure and the use of the evidence so obtained constituted compulsory self-incrimination.

This is seen plainly by considering the alternative consequences. Had the examination of the urine so obtained not disclosed benzedrine, certainly petitioner would not have been inducted because then there would have been no evidence that his disqualifying high blood pressure was artificially induced. On the other hand, if the urine should be found to contain benzedrine, as was determined to be the fact, still petitioner was not to be inducted,—the evidence sought was thus obtained, and instead of inducting petitioner, or determining whether his blood pressure would be normal without the presence of benzedrine, he was prosecuted. In either event, whatever the urine disclosed, he was not to be inducted. It is thus plain beyond the possibility of contradiction that petitioner's order of hospitalization and the hospitalization itself, were not directed toward inducting him.

That obtaining evidence in such manner violates the Fourth Amendment, and that the use of evidence so obtained violates the Fifth Amendment, need no demonstration. *Boyd* v. *United States*, 116 U. S. 616; *Takahashi* v. *United States*, 143 F. (2d) 118; *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250; *Weeks* v. *United States*, 232 U. S. 383; *United States* v. *Coffman*, 50 F. Supp. 823.

The importance of the question is apparent. Basic constitutional guaranties of petitioner and others are intimately concerned. Petitioner is only one of a number of persons who were processed in a similar manner and for a similar purpose whose trials are awaiting the outcome of this case. (R. 10-2, 18, 20, 30, 42-4, 47-8, 50-2, 57-9, 126-8, 295) The sanctioning by the Court below of Selective Service convictions obtained in such manner clearly calls for an exercise of this Court's powers of supervision and correction for future guidance.

IV. In the face of the local publicity to which this case was subjected (R. 69-77), it was probably an abuse of the trial judge's discretion to permit the jury to disperse during the course of its deliberations. *Meyer* v. *Carpenter*, 49 Fed. 32. But whether it was an abuse of discretion or not, the following error resulted.

When the jury reconvened on the final day, after the adjournment which interrupted their deliberations, and were again sent to the jury room, the foreman entered the jury room with a newspaper which was found there after the jury left. It contained an article about the trial, including at least two prejudicial statements, one that petitioner's trial counsel thought the foreman had acted in an unfriendly manner and that counsel had "levelled his eyes and a finger at Keeler [the foreman] and roared an injunction that 'evidence and testimony should guide you twelve men in your verdict' and 'not whether or not you like long hair and boogie-woogie' ", and the other that this was a test case for future prosecution of 17 others to be tried for the same offense. Petitioner moved for a new trial on this ground, which was denied. (R. 294-6, 298-300, 302-4)

It is well settled that such conduct requires the granting of a new trial unless the Government proves the absence of prejudice. *Mattox* v. *United States,* 146 U. S. 140; *Davenport* v. *Commonwealth,* 285 Ky. 628, 148 S. W. (2d) 1054; *Stone* v. *United States,* 113 F. (2d) 70, 77-8; *United States* v. *Ogden,* 105 Fed. 371; *State* v. *Caine,* 134 Ia. 147; *Meyer* v. *Cadwalader, supra;* cf. *Little* v. *United States,* 73 F. (2d) 861. There was not even an attempt to show that there was no prejudice. The decision of the Court below, holding it was not error to refuse a new trial on this ground, sanctions such a departure from accepted tenets of strict propriety in a jury's deliberations in the jury room, as to call for an exercise of this Court's power of supervision.

Conclusion.

The questions raised are of substantial importance. They involve basic constitutional guaranties applicable to criminal trials and procedure, the jurisdiction of District Courts to entertain prosecutions for evading induction under the Selective Training and Service Act in common situations, and the propriety of certain conduct in criminal cases involving substantial prison sentences. Some of the questions were decided below contrary to holdings of this Court. The petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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